

UNITED STATES OF AMERICA
Before the
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Postal Rate and Fee Changes, 2000

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Docket No. R2000-1

OFFICE OF THE CONSUMER ADVOCATE
ANSWER TO REQUESTS OF THE POSTAL SERVICE
AND MMA FOR PROCEDURAL RELIEF CONCERNING
RESPONSE TO NOTICE OF INQUIRY NO. 3
(July 27, 2000)

Pursuant to Presiding Officer's Ruling No. R2000-1/95, July 24, 2000, the Office of the Consumer Advocate ("OCA") hereby answers requests of Major Mailers Association ("MMA") and the Postal Service for relief concerning issues raised by the Postal Service's response to Notice of Inquiry ("NOI") No. 3.

Background

On June 30, 2000, the Commission issued NOI No. 3, seeking comments from the participants concerning a change in the methodology for forecasting First Class additional ounces. The change first appeared in revisions to the workpapers of Postal Service witness Fronk, filed April 17, 2000. The effect of the change was a reduction in the net revenue of single piece First Class Mail of \$172.2 million. The Postal Service filed no testimony at that time supporting or explaining the change in methodology.

On July 17, 2000, prompted by NOI No. 3, the Postal Service submitted testimony of witness Fronk purporting to justify the April 17 change in the additional ounce forecasting methodology. On July 18 the OCA filed a request for oral cross-examination of witness Fronk and also announced its intent to submit rebuttal testimony.¹ When the OCA announced its intent to submit rebuttal to the Fronk response the OCA made two implicit assumptions: that the Fronk response to NOI No. 3 would be admitted into evidence, and that the new material in the response was new *direct* testimony subject to the same testing on the record as other direct testimony. Both assumptions have since been disputed. The admission of the Fronk response has been challenged by MMA, and the Postal Service is hotly contesting the OCA's effort to rebut witness Fronk's belated evidence concerning the change in methodologies.²

The Fronk response was conditionally received into evidence at the hearing on July 21.³ MMA objected to receipt of the Fronk testimony on grounds of notice, fairness, burden, and timeliness; the OCA raised the question of redundancy.⁴ MMA's objection was (and is⁵) that witness Fronk's response to NOI No. 3 constituted supplemental direct testimony that would ordinarily be subject to discovery, cross-examination, and rebuttal

¹ "Request of the Office of the Consumer Advocate to Conduct Oral Cross-Examination of Postal Service Witness David R. Fronk Concerning His Response to Notice of Inquiry No. 3 and Notice of Intent to Submit Rebuttal Evidence," July 18, 2000.

² "Motion of the USPS Regarding the OCA Declaration of Intent to File Testimony 28 Days Out of Time in Response to NOI No. 3," July 20, 2000.

³ "We are going to admit this material into evidence today, subject to motions to strike." Tr. 34/16531. See also *id.* at 16601.

⁴ Tr. 34/16522-24, 16526-27, 16530.

⁵ "MMA's Supplement to Objection to Admission of Postal Service Response in Evidence as Testimony and Comments on Related Procedural Matters," July 24, 2000, at (unnumbered) 4-8.

testimony but that, as a practical matter, there is no time left within the ten-month statutory time-frame to provide a meaningful opportunity to conduct these procedural steps without imposing an unreasonable burden on participants. The Postal Service responded to these objections by asserting that there is nothing in witness Fronk's response that was not also available in a Postal Service interrogatory response filed on April 17.⁶ This assertion prompted the OCA to note that, if it is true that the Fronk response offers nothing new, admission of witness Fronk's response to NOI No. 3 may be barred on the grounds that cumulative testimony is inadmissible under Rule 31(a).⁷

Argument

The Postal Service cannot have it both ways. Either the Fronk response to NOI No. 3 contains new material supporting the Postal Service's revised direct case—in which event participants should be allowed to rebut it through testimony—or else the Fronk response contains nothing new (as evidently asserted by counsel for the Service)—in which case admission of the response burdens the participants without adding to the evidentiary record.

From the OCA's perspective, however, the Fronk response contains a wealth of new information and arguments not contained in any of the "flurry of documents filed on

⁶ "[I]n a flurry of documents filed on April 17th, we did everything we could to document the nature of the errors, the nature of the changes, the nature of the impact, and the nature of changes in workpapers, testimony, interrogatory responses, and we laid it all out to the parties on April 27th [sic]." Tr. 34/16528 (emphasis added). "We had hoped that we had done all we could to lay things out." *Id.* at 16529 (emphasis added). The OCA notes, however, that the Postal Service chose not to file explanatory testimony, and combined the change in the additional ounce forecasting methodology with the correction of an error having to do with net overpayment of postage in a way that was not unraveled until the issuance of NOI No. 3.

⁷ "If that is the case, then Mr. Fronk's response today is cumulative and should not be admitted into evidence." Tr. 34/16530.

April 17th”⁸ Witness Fronk’s attempt to trace increases in the number of additional ounces per piece to specific rate and classification changes is both new and complex.⁹ The attempt to explain away the increasing trend in weight per piece of single piece First Class by use of a contrived statistical example is also new¹⁰ and, more important, does not lend itself to refutation by cross-examination. The presentation of statistical arguments is better left to prepared testimony of expert witnesses than to questioning by counsel with dubious statistical credentials.¹¹

The Postal Service seems to be taking the position that the OCA (as well as other participants) should have foreseen the complex (and, in the OCA’s view, contrived) arguments presented by witness Fronk in his response to NOI No. 3. For example, in its July 20 motion seeking to prevent filing of rebuttal to witness Fronk’s response, the Postal Service states, “This is not a situation where the OCA was unaware of the subject matter of the NOI until its June 30th issuance.”¹² However, this certainly *is* a situation where the OCA was unaware of the rationale behind the change in methodologies, because witness Fronk provided no testimonial explanation in April; the complete explanation was not forthcoming until witness Fronk filed his response to the NOI on July 17.

⁸ *Id.* at 16528.

⁹ Tr. 34/16542-47.

¹⁰ *Id.* at 16542.

¹¹ For an example of the confusion that can be generated by cross-examination on statistical issues, see *id.* at 16583-90.

¹² “Motion of the USPS Regarding the OCA Declaration of Intent to File Testimony 28 Days Out of Time in Response to NOI No. 3,” July 20, 2000, at 3.

The Postal Service also complains that the OCA is seeking a second (or third) “bite’ at the NOI 3 ‘apple.’”¹³ It is not the NOI that the OCA now seeks to rebut. Rather, it is witness Fronk’s new testimony in support of the Postal Service’s altered direct case that the OCA seeks to rebut. Nor does the OCA seek any “*unjust* benefit of developing [its] testimony on the basis of cross-examination,”¹⁴ as charged by the Postal Service. On the contrary, the OCA seeks only the rights it would have had if the Postal Service had filed the Fronk NOI No. 3 testimony when it filed its institutional response to interrogatory OCA/USPS-106(d).

The Postal Service’s motion also overlooks the fact that the change in the additional ounce forecasting methodology was obscured by the way in which it was presented in April. The Postal Service responded to an OCA question involving the net overpayment of postage. At the same time, witness Fronk filed “errata” to reflect changes in various numbers in his testimony flowing from three items, one of which was the institutional response to interrogatory OCA/USPS-106, the question dealing with net overpayment of postage. No expository explanation of the new numbers was provided, and the impact of the change in the additional ounce forecasting methodology was obscured by being netted against the correction of the omission of net overpayment of postage.

In an ironic reversal of roles, however, the Postal Service claims that *it* is the victim of denial of due process. According to the Service, it must have an opportunity to prepare

¹³ *Id.* at 2-3.

¹⁴ *Id.* at 2 (emphasis added).

surrebuttal to the OCA's proposed rebuttal.¹⁵ As the participant who has created the current procedural morass by obliquely revising its direct case three months after filing and one week before hearings—and then submitting new testimony in support of its revisions another three months later—it ill becomes the Service to invoke considerations of due process in its own favor. It is the Postal Service that continues to switch additional ounce “apples” each time the participants begin to get their teeth into one. At a minimum, the OCA should be permitted to file rebuttal to the “final” version of the Service's direct case.

The Postal Service objects to the OCA notice of intent to file rebuttal evidence on August 14, complaining that there would not be time for the Postal Service to file rebuttal of its own. Lest there be any doubt that the Postal Service has received due process, the OCA proposes the following schedule. The OCA is filing its prepared rebuttal testimony today, on the assumption that the Fronk response to NOI No. 3 will remain in the evidentiary record.¹⁶ Hearings on that testimony could be held on August 3 or 4, 2000, *i.e.*, at the same time as hearings on the Postal Service's cost update in response to Order No. 1294. The Postal Service can then file its surrebuttal on August 14.

This procedure would place the Fronk testimony in the same position it would have been in had it been filed in April when the change in methodology was made. That is, the Commission will receive rebuttal evidence to this element of the Postal Service's direct case, and then the Postal Service will have the last word.

¹⁵ *Id.* at 3.

¹⁶ “Office Of The Consumer Advocate Conditional Motion For Leave To File Rebuttal Testimony,” July 27, 2000.

The Postal Service has both the burden of proof and the burden of going forward to support the changed rates that it seeks. When the Postal Service changes a methodology from that filed in its original case, as witness Fronk has done, the Postal Service still has the burden of proof and of going forward with evidence to support the changed methodology. A veiled interrogatory response does not fulfill that burden. Now that witness Fronk has finally offered testimony to support the change in the additional ounce forecasting methodology, the burden of going forward shifts to the other participants (although the burden of proof always lies with the Postal Service). The OCA is willing to accept that burden. If the Postal Service motion is granted, it will be the OCA—not the Postal Service—that will have been denied due process.

WHEREFORE, the OCA requests that the Postal Service motion be denied and, in the event that the MMA objection is overruled, the Commission accept the rebuttal testimony filed contemporaneously herewith.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with Section 12 of the Rules of Practice.


Stephanie S. Wallace

Washington, DC 20268-0001
July 27, 2000